Gan Hwa Kian & Anor v Shencourt Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–1208 OF 2001
ABDUL MALIK ISHAK J
8 FEBRUARY 2007

Contract — Sale and purchase of property — Delay in completion — Defendant failed to deliver vacant possession according to scheduled time — Time of essence — Whether plaintiffs entitled to rescind contract — Whether plaintiffs entitled to a refund of monies paid for purchase and damages for non-fulfillment of contract — Whether plaintiffs could claim insurance premium paid — Contracts Act 1950 ss 56(1), 76

Land Law — Housing developers — Delay in completion — Time of essence — Whether plaintiffs entitled to remedies as purchaser — Whether plaintiffs had locus standi to sue defendant as property was assigned to the bank — Contracts Act 1950 ss 56(1), 76

The plaintiffs and the defendant entered into a sale and purchase agreement ('the agreement') to build and deliver a commercial unit ('the property') within a stipulated time. The defendant did not complete building the property and failed to deliver vacant possession. The plaintiffs rescinded the agreement and demanded the return of all the monies paid. The issues for determination of the court were: (i) whether the plaintiffs were entitled to rescind the contract; (ii) whether the plaintiffs were entitled to a refund of monies paid for purchase and damages for non-fulfillment of contract; (iii) whether plaintiffs could claim the insurance premium paid; and (iv) whether plaintiffs had locus standi to sue defendant as property was assigned to the bank.

Held:

(1) The plaintiffs were entitled to rely on s 56(1) of the Contracts Act 1950 ('CA') and s 34(1) of the Specific Relief Act 1950 ('SRA') to rescind the agreement for failure on the part of the defendant to deliver vacant possession according to the scheduled time. Time was of the essence of the agreement and it was stipulated in cl 37 of the agreement. As the defendant had breached its obligation under the agreement to deliver the property on time, the plaintiffs were entitled to the refund of all the moneys that were paid as well as for damages for the non-fulfilment of the agreement. Section 76 of the CA provides that a party who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. The plaintiffs' entitlement to liquidated damages did not take away the rights of the plaintiffs to rescind the contract (see paras 8–9).

(2) Timely performance was a requisite in the present case. It must be construed as a condition of the agreement. Thus, any delay in performance must be treated as a breach of the agreement. The plaintiffs as the injured parties were certainly entitled to seek recourse in the court. There were no credible assurances given by the defendant as to when the property would be completed. The conduct of the defendant could be construed as an act of renunciation or abandonment of the agreement and therefore constituted a fundamental breach of the agreement (see para 12).

(3) When the plaintiffs gave notice to rescind the said agreement, they had already paid 95% of the purchase price. They had also given due notice to the defendant that they shall be entitled to claim all the damages and loss as a result of the delay in delivering vacant possession and itemised the break down of the damages. It was certainly within the contemplation of the defendant that by virtue of the loan agreement cum assignment between the plaintiffs and Malayan Banking Bhd, the defendant must be assumed to know and contemplate that the plaintiffs would have to pay the insurance premiums. The plaintiffs' claim for the refund of the insurance premium was not remote. Further, the bank gave their consent for the plaintiffs to proceed against the defendant (see paras 15, 21–22).

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan telah memasuki satu perjanjia jualbeli ('perjanjian tersebut') untuk membina dan memajukan satu unit komersial ('hartanah tersebut') dalam tempoh yang ditetapkan. Defendan tidak dapat menyiapkan bangunan hartanah tersebut dan gagal menyerahkan milikan kososng. Plaintif-plaitnif telah menamatkan perjanjian tersebut dan menuntut semula kesemua wang yang telah dibayar. Persoalan-persoalan yang perlu ditentukan mahkamah adalah (i) sama ada plaintif-plaintif berhak menamatkan kontrak; (ii) sama plaintif-plaintif berhak mendapat semula wang yang telah dibayar untuk belian itu dan ganti rugi untuk kontrak yang tidak dipatuhi; (iii) sama ada plaintif-plaintif dapat menuntut premium insurans yang telah dibayar; dan (iv) sama ada plaintif-plaintif mempunyai locus standi untuk menyaman defendan kerana haratnah tersebut telah diserahhakkan kepada bank.

Diputuskan:

(1) Plaintif-plaintif berhak untuk bergantung kepada s 56(1) Akta Kontrak 1950 ('AK') dan s 34(1) Akta Relief Spesifik 1950 ('ARS') untuk menamatkan perjanjian tersebut kerana kegagaln di pihak defendan untuk menyerahkan milikan kosong menurut tempoh yang ditetapkan. Masa adalah inti pati perjanjian tersebut dan ia telah ditetapkan dalam kl 37 perjanjian tersebut. Memandangkan defendan telah melanggar tanggungjawabnya di bawah perjanjian tersebut untuk menyerahkan hartanah tersebut pada waktunya, plaintif-plaintif berhak mendapat semula kesemua wang yang telah dibayar dan juga ganti rugi untuk perjanjian yang tidak dipetuhi. Seksyen 76 AK memperuntukkan bahawa satu pihak yang secara betul menamatkan satu

kontrak adalah berhak mendapat pampasan untuk apa-apa kerugian yang dialaminya disebabkan kontrak yang tidak dipatuhi. Kelayakan plaintif-plaintif terhadap ganti rugi boleh dikira tidak mengambil hak-hak plaintif-plaintif untuk menamatkan kontrak tersebut (lihat perenggan 8–9).

(2) Pelaksanaan yang menepati masa merupakan suatu keperluan dalam kes ini. Adalah penting untuk mentafsirkannya sebagai satu syarat perjanjian tersebut. Oleh itu, apa-apa kelewatan dalam pelaksanaan hendaklah dianggap sebagai satu pelanggaran perjanjian tersbeut. Plaintif-plaitnif sebagai pihak yang terkilan sememangnya berhak untuk memohon bantuan mahkamah. Tiada jaminan yang kukuh diberikan oleh defendan tentang bila hartanah tersebut akan disiapkan. Perbuatan defendan boleh ditafsirkan sebagai satu tindakan meninggal atau menghentikan perjanjian tersebut dan oleh demikian membentuk satu pelanggaran penting perjanjian tersebut (lihat perenggan 12).

(3) Apabila plaintif-plaintif memberikan notis untuk menamatkan perjanjian tersebut, mereka telahpun membayar 95% daripada harga belian. Mereka juga telah memberi notis yang sepatutnya kepada defendan bahawa mereka berhak menuntut untuk kesemua kerugian dan kehilangan akibat daripada kelewatan menyerahkan milikan kosong dan membutirkan kerugian tersebut secara terperinci. Sememangnya dalam jangkaan defendan bahawa menurut perjanjian pinjaman yang juga penyerahhakkan antara plaintif-plaintif dan Malayan Banking Bhd, defendan hendaklah dianggap untuk mengetahui dan menjangkakan bahawa plaintif-plaintif akan membayar premium insurans. Tuntutan plaintif-plaintif untuk mendapat balik premium insurans tidaklah terpencil. Bahkan, bank tersebut telah memberikan persetujuan untuk plaintif-plaintif meneruskan tindakan terhadap defendan (lihat perenggan 15, 21–22).]

Notes

For cases on delay of completion under contract, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4373–4375.

For cases on delay of completion under land law, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2856–2860.

Cases referred to

Beca (Malaysia) Sdn Bhd v Tan Choon Kuang & Anor [1986] 1 MLJ 390 (refd)

Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) & Ors [1971] 2 QB 175; [1971] 1 All ER 1148 (refd)

C Czarnikow Ltd v Koufos [1969] 1 AC 350 (refd)

Castellain v Preston (1883) 11 QBD 380 (refd)

Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308 (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 at p 71 (refd)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101 (refd)

Eng Mee Yong & Ors. v V Letchumanan [1979] 2 MLJ 212 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh Surian Singh & Ors, interveners) [1996] 2 MLJ 431 (refd)

Khau Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 (refd)

Limmewah Development Sdn Bhd v Dr Jasbir Singh s/o Harbhajan Singh [1993] 2 AMR 1263 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (refd)
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1970] AC 213 (refd)
Palmer v Pratt (1824) 2 Bing 185 (refd)
Pearson v Commercial Union Assurance Co (1879) 1 App Cas 498 (refd)
Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97 (refd)
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657 (refd)
Prudential Insurance Co v IRC (1904) 2 KB 658 (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291 (refd)
Rayner v Preston (1881) 18 Ch D 1 (refd)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)
Sales Tax Officer, The, Banaras v Kanhaiya Lal Saraf AIR 1959 SC 135 (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219; [1969] 3 All ER 1626 (refd)
Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor and other appeals [1996] 1 MLJ 825 (refd)
State of West Bengal v M/s BK Mondal & Sons AIR 1962 SC 779 (refd)
Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd [1991] 2 MLJ 565 (refd)
Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289 (refd)
Webb v Hughes (1870) LR 10 Eq 281 (refd)
Xavier Kang Yoon Mook v Insun Development Sdn Bhd [1995] 2 MLJ 91 (refd)

Legislation referred to

Contracts Act 1950 ss 56(1), 76
Housing Developers (Control and Licensing) Act 1966 s 24
Rules of the High Court 1980 O 15 r 16
Specific Relief Act 1950 ss 34(1), 41

Joseph Iruthayam (Joseph Iruthayam & Co) for the plaintiffs.
Kevin Sathiaseelan (Syed Alwi Ng & David Chong) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] I was informed recently by my deputy registrar that there was an appeal pending before the Court of Appeal pertaining to my decision which I decided during the fast track system. I quickly swung into action and called for the court file.

[2] By way of an originating summons in encl 1, the plaintiffs sought for the following orders (in its original Malay text):

(a) suatu pengistiharaan bahawa defendan telah memungkiri terma-terma perjanjian jual beli bertarikh 3 Januari 1995 dan plaintif-plaintif telah dengan sewajarnya menamatkan perjanjian jual beli tersebut pada 9 Mac 2001 atau pada mana-mana tarikh yang

Mahkamah yang mulia berpendapat patut dan sesuai atau dalam alternatifnya suatu deklarasi bahawa perjanjian jual beli tersebut ditamatkan oleh kerana kemungkiran kontrak oleh defendan;

(b) bahawa defendan membayar plaintif-plaintif gantirugi jumlah tertentu yang akan dikira pada kadar 10% setahun ke atas harga pembelian RM298,860.10 yang ditetapkan oleh perjanjian jual beli tersebut yang dikira dari hari-hari untuk penyerahan milikan kosong iaitu daripada 3.1.1998 sehingga tarikh penamatan perjanjian jual beli tersebut iaitu pada 9 Mac 2001 berjumlah RM95,062.68;

(c) bahawa defendan membayar balik plaintif-plaintif segala wang pembelian yang dibayar kepadanya iaitu wang berjumlah RM283,917.10;

(d) bahawa defendan membayar plaintif-plaintif faedah yang dibayar oleh plaintif-plaintif ke atas wang pinjaman berjumlah RM283,917.10 daripada Malayan Banking Berhad kepada pemaju setakat 28 Februari 2001 berjumlah RM60,033.58;

(e) bahawa defendan membayar yuran guaman yang berjumlah RM3,376.89 dibayar oleh plaintif-plaintif kepada peguamcara Malayan Banking Berhad;

(f) bahawa premium insuran sebanyak RM14,034 dibayar balik kepada plaintif-plaintif oleh defendan;

(g) faedah pada kadar 8% setahun ke atas jumlah penghakiman sehingga tarikh penjelasan sepenuhnya;

(h) kos permohonan ini; dan

(i) perintah-perintah lain atau perintah selanjutnya diberikan sepertimana Mahkamah yang mulia ini fikir patut dan suaimanfaat.

[3] The English language text of what the plaintiffs sought for may be translated, briefly, as follows:

(a) a declaration that the defendant has breached the terms of the sale and purchase agreement dated 3 January 1995 and that the plaintiffs had terminated the said agreement on 9 March 2001 or at any date as the court deems fit and proper or, in the alternative, a declaration that the said agreement has been terminated for breach of contract by the defendant;

(b) that the defendant to pay the plaintiffs damages from the date when vacant possession ought to be given and that would be on 3 January 1998 to the date when the sale and purchase agreement was terminated and that would be on 9 March 2001 amounting to RM95,062.68 calculated on the purchase price of RM298,860.10 at 10% per annum on daily rest;

(c) that the defendant to refund to the plaintiffs all the monies paid for the purchase amounting to RM283,917.10;

(d) that the defendant to pay the plaintiffs interest which the plaintiffs had paid to Malayan Banking Berhad who in turn had paid to the developer for the loan of RM283,917.10 calculated as at 28 February 2001 amounting to RM60,033.58;

(e) that the defendant to pay to the plaintiffs the legal fees amounting to RM3,376.89 incurred and expended by the plaintiffs earlier when the plaintiffs paid the solicitors for Malayan Banking Berhad;

(f) that the insurance premium paid by the plaintiffs in the sum of RM14,034 to be refunded to the plaintiffs by the defendant;

(g) interest at the rate of 8% per annum over the judgment sum until the date of full payment;

(h) costs of the application; and

(i) any other orders or relief which this court deems fit and suitable.

[4] A scrutiny of the court file showed that the plaintiffs have withdrawn prayer (e) of encl 1. That was a wise decision. Now, declaration is a remedy that is often resorted to. It developed in England by the courts of equity and it was adopted vigorously by the common law courts, in due course. It comes within the ambit of administrative law. The expanding horizons of the remedy of declaration must be recognised. The tide of judicial pragmatism is strong. It is slowly washing away the marks of fertile dissent left by Lord Denning on the wide beaches of the common law (see *Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) & Ors* [1971] 2 QB 175; [1971] 1 All ER 1148). Edgar Joseph Jr SCJ in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 at p 673, sets out the two main virtues of a declaratory action: firstly, to get the desired relief before damage is caused, and, secondly, to seek clarification of the legal position. Put differently, if someone wants to settle disputes before they reach the point where a right is infringed then that someone should seek the remedy of a declaration (see PW Young, Declaratory Orders (1975)). So, a declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way. Statute wise, it is ideal to refer to s 41 of the Specific Relief Act 1950 (Act 137) and O 15 r 16 of the Rules of the High Court 1980. According to the late Lee Hun Hoe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, p 107:

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

FACTS OF THE CASE

[5] By way of a sale and purchase agreement entered into between the plaintiffs and the defendant dated 3 January 1995 ('the agreement'), the defendant, inter alia, had agreed to build and deliver the commercial unit known as parcel 28, Concourse floor, Galaxy Shopping Centre, Taman Dagang, Ampang, Selangor (' the property') within 36 months from the date of the agreement in consideration of the plaintiffs paying the defendant the purchase price of RM298,860.10 in instalments according to the schedules as set out in Appendix 3 of the said agreement. Pursuant to cl 23(a) of the agreement, the defendant is required to deliver the property to the plaintiffs on or before 2 January 1998. Unfortunately, the defendant did not complete building the said property. The plaintiffs had by notice through their solicitors Messrs Joseph

Iruthayam & Co, dated 8 March 2001 rescinded the said agreement and demanded the return of all the monies.

DECISION OF THE COURT

[6] Clause 23(a) of the agreement (see exh 'GG-1' of the plaintiffs' affidavit in encl 2) states as follows:

> 23 COMPLETION AND HANDING OVER OF VACANT POSSESSION
>
> (a) (a) The property shall be completed by the Vendor and vacant possession shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement.

and it favoured both the plaintiffs. The defendant was required to deliver vacant possession of the said property within 36 calendar months from the date of the agreement and that would be, calculation wise, on or before 2 January 1998. The defendant failed to do so.

[7] Recourse must also be made to the Contracts Act 1950 (Act 136) particularly as to the actual language employed in the Act itself (*Bank of England v Vagliano Brothers* (1891) AC 107; Jayasena v R [1970)] AC 618; *The Sales Tax Officer, Banaras v Kanhaiya Lal Saraf* AIR 1959 SC 135 at pp 139–140; and *State of West Bengal v M/s BK Mondal & Sons* AIR 1962 SC 779 at p 794). But that does not mean that I am barred from referring to the common law as well as to the equitable principles in deciphering a certain section of the Contracts Act 1950 (Act 136). Indeed I am encouraged to do so (*Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219; [1969] 3 All ER 1626; and *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1970] AC 213). I too am duty bound to refer to materials from India for the simple reason that our Contracts Act 1950 (Act 136) is modelled on the Indian Contract Act 1872 (*Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 565 at p 567). English contract law too is eminently suitable to refer to and they are certainly applicable to the local context. Of course, it would be ideal if we could develop our own common law system without 'slavishly' following the English precedents (*Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor and other appeals* [1996] 1 MLJ 825 at p 835).

[8] Be that as it may, the plaintiffs here were certainly entitled to rely on s 56(1) of the Contracts Act 1950 (Act 136) and s 34(1) of the Specific Relief Act 1950 s 41 (Act 137) to rescind the agreement for failure on the part of the defendant to deliver vacant possession according to the scheduled time. Time, incidentally, was of the essence of the contract and it is so stipulated in cl 37 of the agreement. And as the defendant had breached its obligation under the agreement to deliver the property on time, the plaintiffs were certainly entitled to the refund of all the moneys that were paid as well as for damages for the non-fulfilment of the contract (*Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308). According to Dixon J in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, at pp 476–477:

> But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential

condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

[9] Here, the property was not completed on the completion date and that it would be the date when vacant possession was supposed to be given — on or before 2 January 1998. Section 56 of the Contracts Act 1950 (Act 136) states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter's failure to do the thing at or before the specified time. Here, the first limb of s 56 of the Contracts Act 1950 (Act 136) has been fulfilled and since time was the essence of the contract, the contract was voidable at the option of the plaintiffs. And when the property was not completed within the 36 months from the date of the agreement the plaintiffs had the option either to continue with the contract or to rescind it. Here, the plaintiffs decided to rescind the contract. Section 76 of the Contracts Act 1950 (Act 136) provides that a party who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. It was part and parcel of my judgment that the plaintiffs' entitlement to liquidated damages if the defendant failed to complete the property within 36 months did not in any way take away the rights of the plaintiffs to rescind the contract.

[10] The agreement in this case was not modelled after the standard sale and purchase agreement as set out in Schedule 'E' of the Housing Developers (Control And Licensing) Regulations 1982 made pursuant to s 24 of the Housing Developers (Control and Licensing) Act 1966 (Revised 1973) (Act 118) ('the Act'). The Act did not apply in this case and the plaintiffs cannot seek the protection of the Act in their quest for justice as was done in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; in *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335; and in *Xavier Kang Yoon Mook v Insun Development Sdn Bhd* [1995] 2 MLJ 91. The purpose of the Act is now well known. It is to protect all property purchasers from unscrupulous developers (*Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 295; *Beca (Malaysia) Sdn Bhd v Tan Choon Kuang & Anor* [1986] 1 MLJ 390 at pp 394–395; *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1; *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 at p 71; *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97 at p 118; *Limmewah Development Sdn Bhd v Dr Jasbir Singh s/o Harbhajan Singh* [1993] 2 AMR 1263 at pp 1267–1268; and *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh Surian Singh & Ors, interveners)* [1996] 2 MLJ 431).

[11] It cannot be denied that time was the essence of the contract between the parties. In *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, Lord Hailsham said that s 56(1) of the Contracts Act 1950 (Act 136) should be read closely with s 65 of the same Act which provides for the consequences of rescission of a voidable contract. In *Eng Mee Yong & Ors. v V Letchumanan* [1979] 2 MLJ 212, p 218, Lord Diplock had occasion to consider the effect of the failure to perform the contract within a specified date and his Lordship succinctly said that, 'Time being of the essence of the

provisions in the sale agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end'. There are passages appearing in *Halsbury's Laws of England* (4th Ed) Vol 9, at p 370 that merit reproduction. There the learned authors wrote:

> Where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and sue for damages for any loss he may have suffered as a result of the breach. The breach itself does not terminate the contract, the innocent party having the right to elect to treat the contract as continuing or to terminate it by rescission.

[12] Timely performance was a requisite in the present case. It must be construed as a condition of the contract. Thus, any delay in performance must be treated as a breach of the contract. It went to the root of the contract. The plaintiffs as the injured parties were certainly entitled to seek recourse in this court. Time was not waived by the plaintiffs as was done in *Webb v Hughes* (1870) LR 10 Eq 281, at p 286. Just like the case of *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289, p 295, there was no credible assurances given by the defendant as to when the property would be completed. The conduct of the defendant can be construed as an act of 'renunciation or abandonment of the agreement' (to borrow the words of Shankar J (as he then was) in *Tan Yang Long*'s case). It constituted a fundamental breach of the contract. Not to be outwitted, the defendant argued that the plaintiffs had waived their right to rescind the contract when the plaintiffs sought for liquidated damages. The same argument was also raised in *Tan Yang Long*'s case and Shankar J (as he then was) brushed it aside in this way (see pp 295–296 of the report):

> It was further submitted by Newacres that in asking for liquidated damages the plaintiffs waived their right to rescind. But the answer to this is that the defendant did not recognise the existence of these demands, let alone the plaintiffs' right to make them.

I gratefully adopt the above passage in favour of the plaintiffs here.

[13] In regard to the recovery of the insurance premium, I was asked to refer to cl 32 of the agreement. That clause stipulates as follows:

> 32 INSURANCE
>
> (a) The Vendor on behalf of the Purchaser and all other purchasers shall, upon the completion of the Commercial Centre and until the Management Corporation is established, insure and keep insured the Commercial Centre against the loss or damage by fire and against all such other risks as the Vendor may think fit and from the date the Purchaser takes vacant possession of the property, the Purchaser shall pay a proportion of the insurance premium which sum shall be determined by the Vendor.
>
> (b) The proportion of the insurance payable by the Purchaser shall be paid within seven (7) days from the date of the Vendor's written notice requesting the same. If the insurance premium shall remain unpaid by the Purchaser at the expiration of the said period of seven (7) days, interest on such sum shall commence immediately thereafter and be payable by the Purchaser, such interest to be calculated from day

A to day at the rate of thirteen per centum (13%) per annum until full settlement thereof without prejudice to any other rights and remedies of the Vendor hereunder or at law.

B **[14]** And it imposes a duty on the defendant to insure the property against any loss or damage by fire and against all other risks as the defendant may think fit and the plaintiffs shall pay a proportion of the insurance premium as determined by the defendant. But the defendant is only required to insure the property when the property has been completed and until the management corporation has been established. Here, the property was not even completed and vacant possession was not handed to the plaintiffs. In my judgment, cl 32 of the agreement has no relevance C to the issue of the recovery of the insurance premium that was sought for by the plaintiffs. Clause 11 of the loan agreement cum assignment between the plaintiffs and Malayan Banking Bhd dated 21 August 1995 as seen in exh 'DD-3' of the plaintiffs' affidavit in encl 2 would be more appropriate. That cl 11 states as follows:

D 11 INSURANCE

Section 11.01 INSURANCE ON PROPERTY

The Borrower shall always keep insured the Property and all fixtures hereafter erected thereon in the name of the Borrower against loss or damage by fire, lightning, tempest, flood, riot, civil commotion, strike, malicious acts and against such other risks as the Bank E may from time to time think expedient and keep the same so insured throughout the duration of this Agreement to its full insurable value to the satisfaction of the Bank.

and it is the duty of the plaintiffs as the borrowers to insure the property against loss or damage by fire, lightning, tempest, flood, riot, civil commotion, strike, malicious acts, etc throughout the duration of the loan agreement cum assignment F to the satisfaction of Malayan Banking Bhd. The plaintiffs had fulfilled that obligation and had paid the insurance premium of RM14,034 and it was this very sum that the plaintiffs now sought the defendant to refund. Notwithstanding the fact that the defendant consented to the assignment and had put their signatures thereto (see p 28 of exh 'GG-3' of encl 2), the defendant conveniently denied any knowledge in regard to the insurance premium which the plaintiffs had to pay and did pay. G It was argued by the defendant that even if the plaintiffs had paid for the insurance premium, the plaintiffs would have benefited from the insurers if there was an outbreak of a fire. According to the defendant, such an insurance payment was not a condition stipulated by the defendant but rather by the plaintiffs' financiers and, consequently, it was argued that the defendant ought not to be faulted and the H defendant too should not be asked to refund the insurance premium to the plaintiffs. Such a claim, according to the defendant was too remote.

[15] It must be borne in mind that at the time when the plaintiffs gave notice to rescind the said agreement through their solicitors Messrs Joseph Iruthayam & Co, I on 8 March 2001, the plaintiffs had already paid 95% of the purchase price. The plaintiffs too had given due notice to the defendant that they shall be entitled to claim all the damages and loss as a result of the delay in delivering vacant possession and the plaintiffs had also itemised the break down of the damages. The claim by the plaintiffs for the refund of the insurance premium was not remote. The defendant had consented to the assignment of the property to the bank and the

defendant had signed the assignment papers and the defendant must be deemed to know that the plaintiffs were required to pay those insurance premiums (see the receipts as exhibited in 'GG-2' of encl 2).

[16] Channel J, in *Prudential Insurance Co v IRC* (1904) 2 KB 658 at p 663 succinctly defined a contract of insurance in this way:

> Where you insure a ship or a house, you cannot insure that the ship shall not be lost or the house burned, but what you do insure is that a sum of money shall be paid on the happening of a certain event. That I think is the first requirement in a contract of insurance. It must be a contract whereby, for some consideration, usually, but not necessarily, for periodical payment called premiums, you secure to yourself some benefit, usually, but not necessarily the payment of a sum of money upon the happening of some event.

[17] The contract of insurance cannot prevent an accident from happening but it can certainly protect the assured or the insured when the accident happens through payment of a sum of money. According to Brett LJ in *Rayner v Preston* (1881) 18 Ch D 1 at p 9, one must distinguish the subject matter of the contract of insurance from the subject matter of insurance and I can do no better than to reproduce the speech of his Lordship in that case:

> Now, in my judgment, the subject matter of the contract of insurance is money, and money only. The subject matter of insurance is a different thing from the subject matter of the contract of insurance …. The only result in the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money.

[18] The same sentiments were expressed by Bowen LJ in *Castellain v Preston* (1883) 11 QBD 380 at p 397 (CA), in these words:

> What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance.

[19] Here, under cl 11 of the loan agreement cum assignment the subject-matter of insurance has been identified with precision (*Palmer v Pratt* (1824) 2 Bing 185) and it forms part and parcel of the policy (*Griffiths v Bramley-Moore* (1878) 4 QBD 70 (CA)). Here too the description of the locality of the subject matter has been expressed in specific terms (*Pearson v Commercial Union Assurance Co* (1879) 1 App Cas 498).

[20] It was stressed that the claim for the refund of the insurance premium was remote. A lot of legal literature has been written on the definition of the word 'remoteness'. Causation seems to be the prime question to raise and it is usually phrased in such a way as to ask whether the defendant has caused the particular damage to the plaintiff. And if the answer is in the positive then it is appropriate to ask the next vital question: whether the law protects the plaintiff from the particular damage which he has suffered? The House of Lords in *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 upheld the claim of the charterers there to recover for the

shipowner's late delivery of a consignment of sugar being the difference between the market price of sugar at the due delivery date and the market price of sugar at the actual delivery date. According to Lord Reid, the proper test to apply was to ask the question of whether the loss in question was (see pp 382–383):

> … of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach … the words 'not unlikely' … denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.

[21] Thus, when dealing with the question of remoteness of damage in the contractual context the use of the words 'reasonable foreseeability' must be avoided and Lord Upjohn in *C Czarnikow Ltd v Koufos* at p 422 remarked that in assessing damages between two contracting parties the court 'should depend on their assumed common knowledge and contemplation and not on a foreseeable but most unlikely consequence'. It was certainly within the contemplation of the defendant that by virtue of the loan agreement cum assignment between the plaintiffs and Malayan Banking Bhd as alluded to earlier, the defendant must be assumed to know and contemplate that the plaintiffs would have to pay the insurance premiums. It was for this very reason that I hold that the plaintiffs' claim for the refund of the insurance premium was not remote.

[22] Perhaps, the major plank of the defendant's submission was this. That the plaintiffs have no locus standi to sue the defendant because the property has been assigned to Malayan Banking Bhd. Fortunately for the plaintiffs, Malayan Banking Bhd gave their consent for the plaintiffs to proceed against the defendant and such consent can be seen in exh 'GG-9' of encl 2 which was worded in this way:

> Maybank
>
> Your Ref : Housing Loan Account No 414011143686
>
> Our Ref : 27-14011-143686/CAC/DDS/01/CSB/ayi
>
> Date : 12th April 2001
>
> MR GAN HWA KIAN &
>
> MR GAN KOK LIM
>
> E4-1 Bella Vista
>
> Apartment Taman Cahaya 13
>
> 68000 Taman Cahaya
>
> Ampang Selangor
>
> Dear Sirs,
>
> Re: Housing Loan Account No 414011-143686
>
> Pursuant to the Loan Agreement Cum Assignment dated 21 August 1995 wherein the Assignees have assigned all rights, interest and title to the property abovementioned absolutely.

We hereby grant unto the Assignors a consent to enable them to enforce your remedies as available under the law in respect of the Sale and Purchase Agreement dated 3 January 1995 in the Court of Law against the developer of the property abovementioned, ShenCourt Sdn Bhd.

Yours faithfully,

For Maybank

Sgd: (Illegible)

...

CHAI SU BOON

Credit Administration Centre

Kuala Lumpur Main Office.

Malayan Banking Berhad

Menara Maybank, 100, Jalan Tun Perak, 50050 Kuala Lumpur, Malaysia.

Tel: 03-2308833 Fax: 03-2302611 Telex: MA 32837

[23] That would certainly put an end to the matter. For all these reasons, I gave an order in terms of prayers (a), (b), (c), (d), (f), (g) and (h) of encl 1.

[24] Interestingly, the court file showed that the defendant had filed an application for a stay in encl 21. It was heard and dismissed by the managing judge of the then fast track system.

Order in favour of plaintiffs.

Reported by Peter Ling